

STEP 4: WHAT TYPE OF SECTION 404 PERMIT IS REQUIRED FOR THE ACTIVITY?

The fourth step is to identify the type of Section 404 permit required for the activity and prepare a notification or permit application if required.

A. Nationwide Permits

The Corps has developed and periodically updates (approximately every five years) a set of NWP's intended to authorize activities with minimal adverse environmental impacts. As of April 2002, a total of 43 NWP's are available for use; the NWP's are available on-line at http://www.azdot.gov/Highways/EEG/documents/files/biology/404_permits/2002_az_complete_nwp.doc (Corps 2002a).

Each NWP is classified by a permit number and a type of activity within waters of the US, ranging from a specific activity (e.g., NWP 12, Utility Line Activities) to a more generic series of activities (e.g., NWP 18, Minor Discharges [Corps 2002a]). An activity may qualify for one or more NWP's.

1. Nationwide Permit Use Criteria and Impact Limitations

The Corps has established use criteria (detailed descriptions of activities covered by the permit) and impact limitations (e.g., threshold limits for permanent losses of waters of the US) for each NWP.

“The acreage of loss of waters of the US is the threshold measurement of the impact to existing waters for determining whether a project may qualify for a... [Nationwide Permit]....Waters of the US temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the US” (Corps 2002a).

NWP's are intended to authorize activities with minimal adverse environmental impacts.
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Attachment 4, Summary of 2002 Nationwide Permits (Corps 2002b) is a table developed by the Corps listing key use criteria and impact limitations for each NWP. The second portion of Appendix 3, Special Public Notice—Nationwide Permits for Arizona provides the full text of use criteria, impact limitations, other mandatory conditions, and Section 401 requirements for each NWP; the general conditions and regional conditions applicable to all NWP's; and other pertinent information as one document (Corps 2002a). It is important to evaluate the activity against all use criteria, impact limitations, permit application requirements, and conditions associated with a given NWP to confirm applicability. Temporary disturbances of waters of the US are not factored into impact calculations.

ADOT activities in waters of the US often qualify for one or more of the following NWP (the examples of qualifying activities are not inclusive):

- § 3. Maintenance – removal of debris from existing culverts
- § 6. Survey Activities – geotechnical investigations and cultural resource surveys
- § 13. Bank Stabilization – placement of riprap, slope mattresses, and sand bags
- § 14. Linear Transportation Projects – culvert extensions and installations
- § 33. Temporary Construction, Access and Dewatering – installation of temporary culverts

NWP, Approved Categorical Exclusions, can be used for an ADOT activity that is

“...undertaken, assisted, authorized, regulated, funded, or financed, in whole or part, by [a] [f]ederal agency or department where that agency or department has determined...that the activity, work, or discharge is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment...” (Corps 2002a; second portion of Appendix 3).

The third portion of Appendix 3 provides additional detail on the use of NWP 23.

2. Conditions

To ensure applicability of a given NWP, the activity must also be evaluated for its compliance with applicable NWP general conditions, NWP regional conditions, and associated Section 401 certification requirements.

Nationwide Permit General Conditions

The Corps has developed and periodically updates (approximately every five years) a set of NWP General Conditions. As of March 2002, a total of 27 general conditions are in effect (Corps 2002a; second portion of Appendix 3). One additional component listed with the general conditions, unnumbered and entitled Section 10 Condition, pertains only to activities on the Colorado River. An activity must comply with all NWP General Conditions applicable to the type and location of the activity in order to qualify for a NWP.

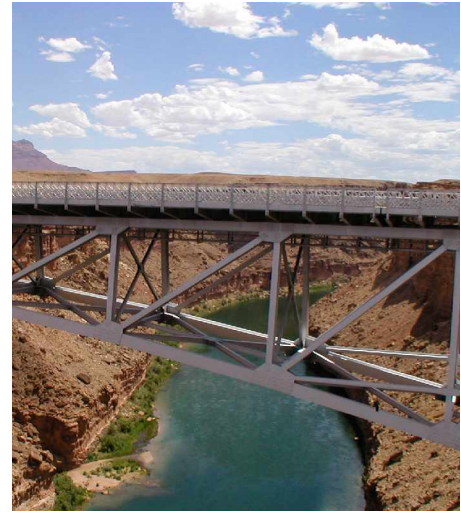
To ensure applicability of a given NWP, the activity must be evaluated for its compliance with applicable NWP general conditions, NWP regional conditions, and associated Section 401 certification requirements.

Nationwide Permit Regional Conditions

The Corps has developed and periodically updates (approximately every five years) a set of NWP regional conditions. As of March 2002, three of the regional conditions in effect apply to activities in Arizona (Corps 2002a; second portion of Appendix 3). In order to qualify for a NWP, an activity must comply with the Nationwide Permit Regional Conditions applicable to the type of the activity and the type of waters of the US to be impacted.

Section 401 Certification Requirements

As detailed in subsequent sections, Section 401 certification requirements vary by NWP. In turn, as applicable, each NWP (second portion of Appendix 3) specifies certification status (certified, conditional, or individual [terms defined later]) based on the type of waters of the US (tribal, unique, or other) to be impacted by an activity. An activity must comply with all Section 401 certification requirements and conditions associated with a given NWP, in order to qualify for that permit.



3. Notification Requirements

Although all activities resulting in discharge of dredged or fill material into waters of the US require compliance with Section 404 and Section 401, some activities that qualify for a NWP do not require notification to the Corps. Notification to the Corps (through a NWP PCN submittal) is required with specific conditions as identified in each NWP, the Nationwide Permit General Conditions, and the Regional Conditions. NWPs that do not require a NWP PCN are referred to as non-notifying permits.

For example, for NWP 14, Linear Transportation Projects, notification to the Corps is required if:

- § the discharge [of dredged or fill material] causes the [permanent] loss of greater than 1/10-acre of waters of the US
- § the activity would involve the discharge [of dredged or fill material] in a special aquatic site, including wetlands...” (Corps 2002a).

NWP General Conditions that require notification to the Corps include:

- § the potential to affect federally listed species or designated critical habitat
- § the potential to affect historic properties eligible for listing on the National Register of Historic Places

In the state of Arizona, in accordance with the Regional Conditions, notification is always required for activities that would discharge to a special aquatic site or a perennial watercourse or waterbody.

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If notification is required, a NWP PCN submittal is prepared (second portion of Appendix 3, NWP General Condition #13).

An activity that qualifies for a NWP, but does not require a Section 404 NWP PCN submittal/401 water quality certification application, must still comply with all applicable criteria/limitations and conditions of that NWP.

4. Guidelines Regarding the Cactus Ferruginous Pygmy-Owl

The Arizona population of the cactus ferruginous pygmy-owl (CFPO [*Glaucidium brasilianum cactorum*]) was listed by the U.S. Fish and Wildlife Service (USFWS) as endangered under the federal Endangered Species Act in 1997.

An activity that does not require a Section 404 NWP PCN submittal must still comply with all applicable criteria/limitations and conditions of that NWP.

In February 2003, USFWS and the Corps developed Guidelines to Ensure the NWP Program Will Not Adversely Affect the CFPO (Attachment 7). These guidelines identify criteria for determining effects to the CFPO anticipated to result from activities requiring a NWP, and must be considered early in the Section 404 permitting process to ensure that the appropriate type of permit is used.

5. Components of a Nationwide Permit Preconstruction Notification Submittal

EEG has developed a checklist of components that must be included in NWP PCN submittals for ADOT activities. The checklist was developed in accordance with NWP General Condition 13 and in coordination with the Corps. The checklist is titled Environmental & Enhancement Checklist for 404 Permit Applications, and is provided as the first portion of Attachment 5 (EEG 2004e). A completed checklist must be provided to EEG with the NWP PCN submittal.

As noted on the checklist, key components of a NWP PCN submittal include (refer to the first portion of Attachment 5 for the complete list of all required NWP PCN submittal components):

- § Application for Department of the Army Permit (ENG Form 4345 [Corps 2004b; Attachment 6])
- § Table 1—Wash Summary (EEG 2004d; provided as third portion of Attachment 2)
- § General conditions compliance

Key data required in the ENG Form 4345 (Corps 2004b; Attachment 6) include but are not limited to:

- § Block 18. Nature of activity: “Describe the overall activity....give approximate dimensions of structures...(identify the materials to be used in construction, as well as the methods...), or excavations (length, width, and height). Indicate whether discharge of dredged or fill material is involved.”
- § Block 20. Reason(s) for discharge: “...explain the specific purpose of the [temporary and permanent] placement of the [dredged or fill] material (such as erosion control).”
- § Block 21. Type(s) of material being discharged and the amount of each type in cubic yards: “Describe the material to be discharged and amount of each material to be discharged within Corps jurisdiction.” Ensure consistency with other application components, including figures.

§ Block 22. Surface area in acres of wetlands or other waters filled: “Describe the area to be filled at each location. Specifically identify the surface areas....also include the means by which the discharge is to be done....if dredged material is to be discharged on an upland site, identify the site and the steps to be taken (if necessary) to prevent runoff from the dredged material back into...[the waters of the US].”



Attachment 6 provides step-by-step instructions developed by the Corps for completing ENG Form 4345.

It is important to note that Block 24 of ENG Form 4345 (Corps 2004b; Attachment 6), pertaining to addresses of adjoining property owners and lessees, is not required for NWP PCN submittals; this information is only required for Individual Permit applications. For NWP PCN submittals, this block should state "not applicable."

Table 1 – Wash Summary (EEG 2004d; third portion of Attachment 2) is coded to identify information required in NWP PCN submittals/Individual Permit applications, and information required in JDs. Activity proponents should modify Table 1 as appropriate when preparing a NWP PCN submittal.

All mitigation measures and conditions applicable to an activity must be reviewed by design personnel and District staff and will be included in the environmental clearance and/or project specifications, as appropriate.

EEG has developed a review form to assist EEG staff in the review of NWP PCN submittals. The form is titled EEG Nationwide/Individual Permit Application Review and is provided as the second portion of Attachment 5 (EEG 2004f). The NWP PCN submittal is ultimately forwarded by EEG to the Corps for their consideration and approval.

All mitigation measures and conditions applicable to an activity must be reviewed by design personnel and District staff and will be included in the environmental clearance and/or project specifications, as appropriate.

A. Individual Permits

If an activity will result in discharge of dredged or fill material into waters of the US, but does not qualify for any NWP (i.e., would not comply with one or more criteria/limitations or conditions), an Individual Permit application shall be prepared. For example, NWPs 7, 12, and 14 do not authorize discharge to special aquatic sites (e.g., wetlands). Individual Permits are intended to authorize activities with greater than minimal adverse environmental impacts.

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All Individual Permits require completion of an application; Section 404 does not provide for non-notifying Individual Permits.

1. Federal Highway Administration Funded Transportation Activities—Operating Agreement

If a transportation activity will use FHWA funding (in whole or part) and requires an Individual Permit, the 2005 Operating Agreement – Integration Process Relative to the National Environmental Policy Act and Section 404 of the Clean Water Act (NEPA/404 OA) must be implemented (Corps et al. 2005; Appendix 4). The intent of the NEPA/404 OA is to integrate NEPA and Section 404

"...in the transportation planning, decision-making, and implementation process...[and to ensure]...the earliest possible consideration of the potential social, economic, and environmental effects of ...[the]... proposed transportation actions as they relate to [w]aters [of the US], including wetlands, and associated endangered, threatened, and sensitive plant and animal species" (Corps et al. 2005).

The NEPA/404 OA identifies specific tasks for applicable agencies to ensure integration of the two processes. The NEPA/404 OA also includes a list of required JD components (Jurisdictional Delineation Request), and a list of required Individual Permit application components (List of Information Required for Complete Application). These required components are also listed in EEG documents provided as the first portion of Attachment 2 and the first portion of Attachment 5, respectively. The NEPA/404 OA also includes a copy of a Notification of Commencement and Completion of Work postcard, typically provided to the ADOT activity proponent by EEG.

2. Section 404(b)(1) Guidelines

The Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR 230) were developed by the Corps and EPA to assist in implementation of the CWA, and state that

"...dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern" (40 CFR 230).

The Section 404(b)(1) guidelines (provided as first portion of Appendix 5) outline the Corps' review standards for Individual Permit applications, above and beyond NWP review standards.



3. Components of an Individual Permit Application

Components Common to Nationwide Preconstruction Notification Submittals and Individual Permit Applications

Typically, an Individual Permit application includes most components submitted in a NWP PCN submittal. Individual Permit applications for ADOT activities must include all pertinent components identified in the Environmental & Enhancement Checklist for 404 Permit Applications (EEG 2004e; first portion of Attachment 5). A completed checklist must be provided to EEG with the Individual Permit application.

Additional Individual Permit Application Components

Draft Decision Document

Before approving an Individual Permit application, the Corps must demonstrate that the activity will comply with all provisions of the Section 404(b)(1) guidelines, as well as NEPA and other applicable federal laws and policies. To demonstrate compliance with the Section 404(b)(1) guidelines, as well as NEPA and other applicable federal laws and policies, a Decision Document is prepared as part of the Individual Permit application. The document constitutes the following:

- § Environmental Assessment – prepared to meet NEPA requirements and demonstrate compliance with other applicable federal regulations
- § Review and Compliance Determination – prepared to demonstrate compliance with all provisions of the Section 404(b)(1) guidelines
- § Alternatives Analysis – prepared to describe the activity sites and designs considered during the planning process, and explain why the site and design is the least environmentally damaging, practicable means of satisfying the purpose of the activity (the Corps cannot authorize an activity if a practicable alternative would result in less adverse impact on the aquatic ecosystem, provided that the alternative would not result in other significant adverse environmental consequences)
- § Statement of Findings – prepared to summarize compliance with other applicable federal regulations and results of public notice and comment process
- § Public Interest Review – prepared to demonstrate that the activity is not contrary to the public interest. It addresses the public and private need for the activity, anticipated impacts on public and private uses of activity site, etc.
- § Finding of No Significant Impact – prepared to demonstrate that an Environmental Impact Statement is not required for the activity

For most ADOT activities, a draft Decision Document is prepared by ADOT personnel in the Corps' preferred format (Corps' document template provided as the second portion of Appendix 5), encompassing the components listed above. The document is typically revised and finalized by the Corps.

NEPA/404 MOU Compliance

In addition, Individual Permit applications for federally funded transportation activities must include documentation of compliance with the NEPA/404 MOU (Corps et al. 1993/1994).

All mitigation measures and conditions applicable to an activity must be reviewed by design personnel and District staff and will be included in the environmental clearance and/or project specifications, as appropriate.

EEG staff use the EEG Nationwide/Individual Permit Application Review form (EEG 2004f; second portion of Attachment 5) when reviewing Individual Permit applications. The Individual Permit application is ultimately forwarded by EEG to the Corps for their consideration and approval.